

**CASES**

**ARGUED AND DETERMINED**

**IN THE**

**SUPREME COURT**

**OF THE**

**STATE OF LOUISIANA.**

**EASTERN DISTRICT, MAY TERM, 1821.\***

*East'n District.  
May, 1821.*

**BOUTHENY & AL. vs. DREUX & AL.**

**BOUTHENY  
& AL.  
vs.  
DREUX & AL.**

**APPEAL from the court of the first district.**

Although the court of probates, of the parish and city of New-Orleans, has ordered the execution of a will, any person interested to have it set aside, may bring suit in the district court.

**PORTER, J.** I concur in the opinions which judge Martin has prepared, and as there has not been an uniformity of decision, on the point, which decides the cause as it is now presented to the court, I wish to state the reasons which influence my opinion, respecting the regularity of the proceedings before the court of probates.

The constitution began to be binding on the people, and all the officers of government, as soon as the state was admitted in the union, and thenceforth, judicial proceed-

It is contended by the plaintiff, that the constitution required, that the record of that court should be preserved in that language

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in which the constitution of the united states  
is written.

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ings were to be  
preserved in the  
language in  
which the con-  
stitution of the  
united states is  
written.

The general principle seems to be admitted  
by the defendants. But they urge, that as the  
proceedings, ordering execution of this will,  
took place on the 12th of December, 1812,  
while the government was administered under  
the schedule; that the provision in the con-  
stitution, in regard to the language in which  
our public records was to be preserved, was  
not then in operation.

To decide this point, it is necessary to as-  
certain when the constitution was in force. I  
think from the moment it was accepted by  
congress, and Louisiana admitted into the  
union, and from the same time the territorial  
government was at end. To adopt the other  
construction, and consider the judges terri-  
torial officers, we must suppose two govern-  
ments exercising their functions within the  
limits of this state, at the same time.

If this construction is adopted, then the  
constitution did not come into operation at  
once, but spread itself gradually through  
every department of government, and the  
territorial system expired, by degrees, as the  
new government was carried into operation,

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in the executive, the legislative and the judiciary.

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Had the schedule not provided that the officers, under the territorial government, should continue in their respective situations, until others were appointed, I suppose there can be little doubt but their function would have expired the moment the state became independent and sovereign.

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But the schedule, in providing that these officers should remain in the exercise of their respective functions, until new ones were appointed, did not preserve those laws, which were contrary to its policy or its provisions; on the contrary, the very section which follows, directing that the judges, governor, and secretary shall remain in office, declares that the laws not inconsistent with the constitution, shall remain in force until repealed. This is the same thing as if it had said, that laws inconsistent with it were repealed.

It was inconsistent with a provision of that instrument, that judicial proceedings should be carried on in the French language; those which were preserved in that language must, of course be treated as null and void.

I should have had no doubt on this question,

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were it not for the decisions which have taken place in this court. But on constitutional questions, great as my respect is, for those who thought differently, I cannot yield up my own opinion.

As this point was not made in the court below, and the will was not annulled by the irregularity, I am of opinion, that the cause be remanded, with directions to the judge to have it tried on its merits, and that the defendants and appellees pay the costs of this appeal.

MARTIN, J. The plaintiffs seek to annul the will of their brother, the testator of the defendants, and if they fail to do so, to set aside a legacy therein contained, to obtain the delivery of the estate.

The district court dismissed the petition, being of opinion, that "the court of probates, of the parish of New-Orleans, is not a court of inferior jurisdiction to this court, (that of the final judicial district.) An appeal from that court lies immediately from that to the court of appeals; and any order, judgment, or decree which this court (the district court) may make, declaring any act of the court of probates void, could have no effect, as it could

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not be so certified to the court of probates, nor could that court be bound to obey or notice it, until the will is declared void by a competent court; this (the district court) can make no order in regard to the estate in the hands of the executor." The plaintiff appealed.

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It appears to me, the probate of a will, in the court of probates, is not conclusive against persons who were not cited and offered the opportunity of contesting it. It is true, no will can be executed in this state, until it be presented to the parish judge, who, after due proof of it, is to order its execution. *Civ. Code*, 202, art. 153. There cannot be any doubt, that, after the formality has been complied with, any person interested in setting aside the will, may be heard against it, in the district court. In the case of *Broussin & al. vs. Vasson & Martin*, 169, the will of the defendant's wife, having been admitted in the court of probates, a suit was brought in that of the first judicial district, where it was accordingly set aside. It is true, on the appeal, the decree of the district court was reversed, but not on the ground of its want of jurisdiction, which was not contested. I conclude, that

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the district judge erred, and the judgment ought to be reversed.

The proceedings of the court of probates upon this will are of the 12th of December, 1812, and were recorded in the French language, and the plaintiffs' counsel insists, that they are, on this ground, absolutely void, under the 15th section of the 6th article of the constitution. \* 1 *Martin's Digest*, 122.

The defendants' counsel replies, that as the parish judge derived his authority from the 3d section of the schedule, and had no commission from the state, he was not bound to regard, in his proceedings, the provision of the constitution, and cites the case of *Dufan & al. vs. Musicot & al.* 3 *Martin*, 289, and that of *Rumadez vs. Ibanex*, *ib.* 2.

In *W. F. Macarty's case*, 2 *Martin*, 276, which was in the fall of 1812, the superior court of the late territory, the members of which were then acting under the authority derived from the schedule, declared, that they could not recognise any validity or force in any judicial proceeding, couched in any other language than that in which the constitution of the united states is written.

I therefore conclude, that the question is

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not perfectly settled, and still open for inter-rogation.

In my view of the constitution, the state borrowed from the territorial government, its officers, and laws not repugnant to the constitution. It did not continue the territorial government, but intended, that the state government should commence as soon as the state was declared by congress to be one of the United States of America. For the schedule itself, after stating that the territorial officers shall continue in the exercise of the duties of their respective departments, expressed what laws are to be in force, all those then in force in the territory, not inconsistent with the constitution. Hence I apprehend the constitution was in full force, as soon as the state became a member of the union.

The court of probates then, which passed on the will, which is the object of the present suit, was then a state court; its judge derived his powers from the constitution, which, as to the language in which the written proceedings of the court were to be promulgated, preserved and conducted, afforded the only legitimate rule of conduct.

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On the 12th of December, '1812, the state of Louisiana had been for seven months a member of the union. The executive and legislative departments had been filled by persons elected under the constitution. A session of the legislative body had been held. It is true, the judges had not received any new commission; but the territorial government existed no longer; that of the state had taken its place, and every part of it was to be administered according to the provisions of the constitution.

I therefore conclude, that the proceedings of the court of probates, of the parish and city of New-Orleans, on the will, which is the object of this suit, having been promulgated, preserved and conducted in the French language, cannot be considered by us as having any force or validity.

As the objection which I have just now examined, appears not to have been made in the district court, I think it our duty to remand the cause, with directions to the judge to hear and determine the cause on its merits. The costs of this appeal ought to be borne by the defendants and appellees.

MATHEWS, J. In dissenting from the opinion and judgment of the majority of the court, in this case, I feel much relieved from the diffidence and unpleasantness which must always occur in similar situations, by the circumstance of finding myself adhering to principles heretofore settled by two decisions, viz. in the case of *Bermudez vs. Ibanez*, and *Dufau vs. Massicot & al.* I am still of opinion, that the interpretation given to that part of our state constitution, which requires the records of judicial proceedings to be kept in the language in which the constitution of the united states is written, furnishes the only just and equitable grounds on which the change from the territorial to the state government took place. It was, from necessity, gradual, and the former laws and authorities were not instantly destroyed by the formation of the new government, but yielded to constitutional legislation and appointments.

It is true, that the convention did, by a schedule annexed to the constitution, provide for the continuance of the former government; but I do not believe that it would have ceased to exist in all its parts, unsupported by this instrument. The same then, would have

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taken place, without the interference of the convention; founded on the political maxim, that a government, in operation over a civil society, does not cease by the most radical change in form, until the means of giving full effect to the new constitution be provided. For, an *interregnum* cannot be tolerated. The executive power of the territorial government ceased only by the appointment of a governor under the constitution. The legislative power, as established by congress, was at an end immediately on the adoption of the new form of government, and could only be revived, conformably to its provisions, during the cessation of legislative power—the laws must have remained as they were previous to that interval. The judicial authorities, like the executive, continued in force, until supplanted by new appointments, in pursuance of the state constitution, and were not bound to enforce its provisions, as they did not derive the power from it.

It must be confessed, that this view of the subject exhibits an appearance somewhat anomalous; but may be considered as neces-

sarily resulting from a change in government, like that which this country experienced in becoming a sovereign and independent state, from colonial dependence.

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It is ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the case be remanded to be heard on its merits; and it is ordered, that the defendants and appellees pay the costs of this appeal.

*Seghers* for the plaintiffs, *Cuvillier* for the defendants.

CASANOVICHI & AL. vs. DEBON & AL.

APPEAL from the court of probates of the parish and city of New-Orleans.

Before the act of 1820, the court of probates had power to decree the exhibiting and filing of an executor's account, and a *distingas* was the proper writ of execution.

PORTER, J. Judge Martin has communicated to me an opinion he has prepared in this case. It expresses so fully my ideas on the question which the cause presents, that I deem it sufficient to state, that I agree in the conclusion to which he has arrived; and am of opinion, that the judgment of the parish court, denying the party the benefit of the decree formerly rendered in the cause, which

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directed the executor to file the accounts, be annulled, avoided and reversed; and that this cause be remanded, with directions to the judge of probates, to proceed on the judgment ordering the executor to account, and that the appellees pay the costs of this appeal.

MARTIN, J. The plaintiffs, heirs of E. Gref, fin, brought this suit against the defendants, his executors (for an account of the estate, and the delivery of the residue) in the court of probates of the parish and city of New-Orleans.

The defendant, Debon, filed a plea, declining the jurisdiction of the court. This plea was over-ruled, and he was ordered to answer over. Judgment was taken by default, against the other defendant, for want of a plea or answer; neither of the defendants having taken any further step, the judgment by default was confirmed, and the court decreed, that both the defendants should exhibit, and file the accounts of their executorship.

No account having been exhibited, the

plaintiffs moved for a writ of *distringas*, which was refused; the court of probates being of opinion, that all the proceedings in the case were irregular, as the court was hitherto without any jurisdiction in the case, and could not decide it, only from the late act of the legislature, approved on the 18th of March, 1820. So that, if any thing was now claimed, in consequence of that act, the proceedings must be begun *de novo*.

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The plaintiffs contend, that at the time of the inception of the suit, the matter was cognizable in the court of probates, and no other; and if it was not, the plaintiffs were without a remedy. They refer us to the part of the *Code*, which provides, that the jurisdiction exercised by parish judges, by virtue of the law in general, as well as by the provisions contained in the present *Code*, with respect to the opening, &c. of wills, the appointment, &c. of testamentary executors, &c. the inventory, appraisement, and sales of estates where absent heirs are interested, and generally, all judicial acts relative to said persons, and the administration of their property, shall be exercised, as it regards the parish of New-Orleans, by the city judge, &c.

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*Civ. Code*, 182, art. 153. It is true, that the executor must render an account of his administration, at the expiration of the year of his executorship. *Civil Code*, 246, art. 173, and we are further referred to the *Code*, 246, art. 174, 182, art. 152, 180, art. 142, 6, 176, art. 135, 70, art. 69.

It appears to me, that at the expiration of a year and a day (if the time be not prolonged) from the date of the letters testamentary, the office of the executor expires; that during that period, he must, if called upon, render an account of his executorship, and is bound at its expiration, to exhibit and file his general account.

In the present case, the defendants (the year of executorship having expired, and no application having been made for its prolongation) were bound to account, and on their neglect the judge certainly could (before the passage of the late act) have directed them to do so; and his order, in that respect, is not less valid, for having been provoked by the party interested in the estate.

The court having, in my opinion, properly made the order, it is clear, had the power, and it was its duty to enforce it. This has

been endeavoured to be done by a writ of *distringas*, which is justified under an act of the legislative council, *ch. 26, sect. 17*, which provides, that writ for the execution of judgments, to be performed otherwise than by the payment of money. This provision, I think, relates only to final judgments, not to an interlocutory order, as those for the production of accounts or papers, which are more promptly enforced by a writ of attachment.

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I therefore think, that we ought to reverse the decree or judgment of the court of probates, directing the plaintiffs to proceed *de novo*, and remand the cause, with directions to the judge to enforce his decree, directing the defendants to file and exhibit their accounts, and that the costs of this appeal be borne by the defendants and appellees.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that judgment of the court of probates be annulled, avoided and reversed; and that the cause be remanded, with directions to the judge to enforce his order, directing the defendants to exhibit and file the accounts of their executorships; and it is further ordered,

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that the costs of this appeal be borne by the  
defendants and appellees.

Smith for the plaintiffs, ——— for the de-  
fendants.

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The attorney,  
appointed by a  
court of pro-  
bates to repre-  
sent absent  
heirs, cannot do  
so in another  
court.

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city of New-Orleans.

PORTER, J. The only question which this  
case presents, is whether the attorney for ab-  
sent heirs, appointed by the court of probates,  
is authorised to defend their interests before  
another tribunal.

The act relative to that court, passed on  
the 22d of February, 1817. *sect. 5*, directs,  
that in all vacant estates, it shall be the duty  
of every judge of probates, to appoint a per-  
son, learned in the law, to defend the inter-  
est of the absent heirs.

This is not a vacant estate, but if it was, I  
am of opinion that the attorney thus appoint-  
ed, can act only in the court for which he is  
appointed. The statute treats of that court  
alone, as its title imports, and there is nothing  
contained in it, from which I can learn that  
it was in contemplation of the legislature to  
extend their authority to any other.

By the *Partida*, 3, 2, 12, it is provided; that when a suit is to be commenced against a person who is absent, the plaintiff may petition the judge to appoint a curator, and it shall be the duty of the judge to do so. This shews clearly, that when an action of this kind is brought, there must be a person specially nominated to defend the rights and interest of the absentee.

A suit against such curator, says the law just cited, forms the *res judicata* between the parties, provided the other formalities of the law are pursued—a suit against any other, I do not think has that effect.

I am therefore of opinion, that the judgment of the parish court be annulled, avoided and reversed, and that this cause be remanded for a new trial; and that the plaintiffs and appellees pay the costs of this appeal.

MARTIN, J. I think so.

MATHEWS, J. So do I.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the costs of this appeal be borne by the plaintiffs and appellees.

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SHAMBURGH vs. COMMAGERE & AL.

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APPEAL from the court of the parish and city of New-Orleans.

An endorser may prove an alteration in the note, made after the endorsement.

The maker of a note is to be called upon, at his domicil.

PORTER J. This is an action by the endorsee, against the endorser of a promissory note. The defence set up is forgery, and alteration in the note after it was endorsed; also want of regular protest and due notice.

On the trial, the defendants offered the first endorser of the note, to prove that it was altered after he put his name on it, as well in date as in amount; the court rejected him, and an exception has been taken to that opinion.

The question of the admissibility of a party to a negotiable instrument, to come in as a witness, and destroy a paper to which his name has given currency, appears to be now settled by authority in the negative: but that rule applies to any thing which occurred before he put his name on it, not after; if the note in this case was altered subsequent to the endorsement, the endorser never gave that note, *so altered*, credit; it was a paper of a different kind that he put his name on.

But admitting that the witness had proved every thing, which the party offering him aver-

red he could prove, his testimony could not have varied the result; for the question is not whether it was altered after Morse endorsed it, but whether any change was made after the defendants put their names on it? The evidence on this head is completely opposed to this idea; it satisfies me that when endorsed by the defendants, it was already filled up for the amount stated in the petition.

The protest was regularly made, and due notice given, *Chitty on Bills*, 266. A man's residence is the place where it is presumed he is to be found, and has funds to meet the demand, and there is no obligation on the holder to seek for him elsewhere.

I am therefore of opinion, that the judgment of the parish court be affirmed with costs.

MARTIN, J. I concur in this opinion.

MATHEWS, J. I do likewise.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

*Hoffman* for the plaintiff, *Eustis* for the defendants.

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*WILTZ vs. DUFAU & AL.*

WILTZ  
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DUFAU & AL.

APPEAL from the court of the first district.

When the parol evidence is not taken down in open court, it cannot be used on appeal without a statement of facts.

MARTIN, J.\* There being long and intricate accounts to examine in this suit, they were submitted to referees, and on their report, objections were made by the defendants' counsel, on several grounds, particularly, because an allowance was made to one of the parties for a sum, as paid for the account of the others, whilst he had paid it in discharge of a private debt of his.

This objection was over-ruled, and to redress the injury, resulting from the refusal of the judge to correct the alleged error of the referees, is the object of this appeal.

There is not any statement of facts; but by an agreement of the parties, the award of the referees, and all accounts made by them, in support of the said award, are to be read in this court.

The counsel for the appellees has imagined, that this agreement authorises him to read here, depositions taken before a magistrate, and read in the district court.

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\* PORTER, J. was absent till the beginning of December, with the leave of the legislature.

I think that when the parol evidence is not reduced to writing in open court, the party has no right to bring it before us, otherwise than by a statement of facts, agreed on between the parties; or on failure of such, by the judge.

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I therefore conclude, that the appeal ought to be dismissed with costs.

MATHEWS, J. I concur in this opinion for the reasons therein expressed, which shew it to be entirely conformable to law, and the uniform practice of this court.

It is therefore ordered, that the appeal be dismissed with costs.

*Livingston* for plaintiff, *Moreau* for defendants.

HEWES vs. LAUVE.

APPEAL from the court of the first district.

MARTIN, J. This case was before us about two years ago, and was remanded for a new trial; judgment was given as before, and the case is brought back by the same party. 6 *Martin*, 502.

If A. give goods to B. to sell, and B. pronounce C. an auctioneer to sell them, C. is accountable to B. only.

It appears that the plaintiff gave certain goods to J. Howe & co. to be sold at auction;

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that they were so sold, and said J. Howe & co. have absconded, and the proceeds are still unpaid to the plaintiff, who thinks he has a claim therefore against the defendant. He has endeavoured to shew, that a partnership existed between the defendant and J. Howe & co., but on this point I think the district judge did not err in concluding that he failed.

An attempt has been next made to charge the defendant, on the ground that J. Howe & co. were his agents, and he is liable for their misconduct. But the evidence rather shews that the defendant was the agent of J. Howe & co. The defendant, as auctioneer, attended at the call of J. Howe & co. at their store, to sell as an auctioneer, such goods as had been committed to their care, for the purpose of being so sold. He did so, content with receiving reduced commissions, expecting to be indemnified by the quantity of goods they had induced him to believe they would procure. The plaintiff gave them his, in order that they might procure the sale of them among those of their other customers. In selling them, the defendant acted as the direct agent of J. Howe & co., and was accountable to them for the proceeds: there was no privity between the plaintiff and

defendant. The goods were sold by the latter, as the property of J. Howe & co., and he is in no way liable to him.

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I therefore conclude, that the judgment of the district court ought to be affirmed with costs.

MATHEWS, J. I concur in this opinion.

There is no evidence of any partnership between J. Howe & co. and the defendant, and the latter must be considered as having acted in his capacity of auctioneer for Howe & co., who were agents for the plaintiff, and are alone responsible to him.

It is therefore ordered, that the judgment of the district court be affirmed with costs.

*Maybin* for the plaintiff, *Livingston* for the defendant.

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TORRY & AL. SYNDICS vs. SHAMBURGH.

APPEAL from the court of the first district

MARTIN, J. Judge Mathews has communicated to me an opinion he has prepared in this case, and in which I concur.

The stay of proceedings does not prevent the record of a mortgage.

MATHEWS, J. This is a suit brought to ob-

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tain a rescission of a judicial mortgage, which the appellee caused to be recorded after the failure and *cessio bonorum* of the persons whom the appellants represent as syndics aforesaid.

The judgment alluded to was given in favor of the defendant, previous to the cession of property by the insolvents, but was recorded subsequent to an order granted, in the usual form, to stay proceedings against them.

I am of the opinion of the district court, that the conduct of the appellee, in causing his judgment to be recorded, was not in violation of the order by which proceedings were stayed; and that the mortgage ought not in the present mode to be annulled and rescinded.

The effect which it must have on the credit of the defendant, in relation to other creditors, will be regularly ascertained at the time when the appellants are about to distribute the insolvents' estate.

It is therefore ordered, adjudged and decreed, that the judgment of the court *a quo* be affirmed with costs.

*Hoffman* for the plaintiffs, *Eustis* for the defendant.

*MARIE vs. AVART'S HEIRS.*East'n District.  
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APPEAL from the court of the parish and city of New-Orleans. 8 *Martin*, 618.

*MARIE*  
vs.  
*AVART'S HEIRS*

This opinion was pronounced in December term last, and was suspended by a motion for a rehearing, which was granted; it is now printed with the opinion after the rehearing.

The heir may avail himself of the testator's insanity, although his interdiction was not provoked.

A public act may be impeached by the subscribing witnesses.

MARTIN, J. delivered the opinion of the court last December. The plaintiff's counsel urges, that a will cannot be attacked on the ground of the testator's insanity, unless his interdiction was at least provoked during his life; that when a will contains a clause attesting the testator's sanity, parol evidence cannot be admitted to disprove it; that an affidavit for a continuance, on the ground of newly discovered evidence, needs not to be made by the party himself, but may be so by the counsel, or attorney-at-law.

I. Both parties admit, that before the promulgation of the *Code*, the party attacking a will, on account of the insanity of the testator, had no need to shew that the interdiction of the latter had been provoked.

The *Code* therefore affords us the only rule

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of conduct, though we may be aided by the labours of law writers, and by the decisions of courts.

It is difficult to find any sense in the article relied on by the plaintiff's counsel, "after the death of a person interdicted, the validity of acts done by him or her, cannot be contested for cause of insanity, unless the interdiction was pronounced or petitioned for, previous to the death of such a person." *Code Civil*, 80, art. 16.

In the French text, the words *person interdicted*, are rendered by *un interdit*.

Now can there be any interdicted person, whose interdiction was not pronounced previous to the death of such person? Can any one be interdicted after his death?

It is evident that in transcribing the corresponding article of the *Napoleon Code*, the words *un interdit*, have been substituted to the words *un individu*.

Are we at liberty to correct this error, and to substitute in the English text, the words *an individual*, to the words *a person interdicted*, or to erase the word *interdicted*?

The counsel of both parties have argued as if we were, and it is the only manner of giving any meaning to the words of the legislature.

Taking this for granted, it is clear that if no other part of the *Code* control this article, donations are not excepted from it.

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The defendants present the following, as a part of the *Code* which controls this article, "to make a donation *inter vivos* or *mortis causâ*, one must be of sound mind." *Id.* 208, art. 5.

The sanity of an *alienor* is, without this article, required in *every* case. Not less in a sale, exchange, &c. than in a *donation*.

A statute ought to be so construed, that every part of it may have some meaning and effect. If a donation be not put on a different ground than any other alienation, what effect has this last article of the *Code*?

In emphatically and expressly requiring the sanity of a donor, the legislature made it more particularly a *sine quâ non* of this kind of alienation, which the donee, or the person claiming under him, may be called on to establish, even when the donation is not formally attacked, on account of its absence; we incline to the opinion of the jurists and courts of France, who have held that the two corresponding articles of the *Napoleon Code* are to be construed together, so as to exclude donations from the operation of the first.

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The evident object of this article was the protection of *alienees*, from the rapacity of near relations of an insane person, who might neglect to have him interdicted, in order to induce purchases from him, with the view of causing them to be afterwards set aside.

A donee, legatee, or instituted heir, needs no such protection; as he gives nothing, he cannot be injured.

If this be the case, as to a donation *inter vivos*, it must be particularly so as to a last will. The persons, around a dying man, might easily defeat the rights of the heir at law, if they could improve a moment of delirium or stupor so ordinary before dissolution, to procure an apparent will, that would baffle investigation; unless the heir had such timely notice as would enable him to provoke the interdiction of the dying man.

II. The next point seems to have been before us in the case of *Langlish vs. Schons & al.* 5 *Martin*, 405. We there held that a public act might be impeached, by the witnesses who subscribed it. The declaration of such witnesses, in this as in every other case, may be opposed by other testimony.

III. The affidavit of the attorney-at-law, or counsel, stating the discovery of new evidence, not in the knowledge of the party, and which the latter could not have discovered, is not sufficient, when his silence or absence is not accounted for.

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It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

The following opinion was now pronounced after a rehearing ;—

MARTIN, J. After a mature reconsideration of the opinion pronounced in this cause in December last, it does not appear to me that there would be any propriety in making an alteration in its dispositions.

It seems to me, the continuance was rightly denied, even if it be clear that the affidavit was properly made by the attorney-at-law instead of the plaintiff.

I express no opinion whether an attorney in fact, who represents a slave suing for his freedom, may be received instead of the party. Judge Porter, before his departure, having doubted the correctness of the opinion of the court in this respect, but acquiescing with

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us in all the other parts of it, admitting the propriety of the continuance being denied on the affidavit, even if it were made by the party herself. I think it better to reserve the final settlement of the question, for a case in which the solution of it may be necessary to a decision.

MATHEWS, J. concurred.

*Livingston* for the plaintiff, *Mazerau* for the defendants.

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ST. ROMES vs. PORE.

If the disease was curable in its origin, but incurable at the time of the sale, the case is a redhibitory one.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. This is an action for the rescission of the sale of a negro woman, on the ground that she was attacked with the malady of which she died soon after the sale, previous and at the time of the contract. The defence is, that the defendant, *finding that the woman was sick*, had her sold at auction, on the 2d of May, when she was struck to the plaintiff. That soon after, the plaintiff informed him he would not take the woman, as she was sick; to which the defendant replied, he thought he was bound to take her, as she had, according

to the defendant's orders, been sold, with the only warranty of the redhibitory diseases; that on the 9th, the plaintiff informed him, he would accept the sale, and the defendant executed the bill of sale for her to the plaintiff, before a notary-public.

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FORE.

There was judgment for the plaintiff, and the defendant appealed.

The defendant, by interrogatories, drew the following facts from the plaintiff:—

The plaintiff, after the auction, and before the execution of the sale before the notary, told the defendant he would not take the wench, as he had discovered that she was sick: to which the defendant replied, *he did not know whether she was*, but that, at all events, he meant to sell, and had actually sold, her as he had bought her, *i. e.* with a warranty of all redhibitory diseases. To the best of the plaintiff's recollection, of the correctness of which he declared himself sure, the defendant did not say, that unless the plaintiff could prove that the woman's disease was a redhibitory one, he could not help taking her, as those only were warranted against. Some days after, and in consequence of the defendant's declarations, the parties met at the notary's office, and executed the act of sale.

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The statement of facts shews—that

Dr. Dow deposed, that he was called upon to see the woman, just after the defendant bought her, and recognised her as a patient whom he had visited at her former mistress's seven months before; at that time she laboured under an intermittent fever, occasioned by a suppression of the menstrual discharge; he ordered the ordinary remedies, wine, bark, and a generous diet, with exercise; when he saw her at the defendant's, he found her weak, her legs swollen, and told him a generous diet and proper medicines would effect her cure; and as he did not consider her as incurable, and as she was a valuable servant, he advised him to have her well attended. He has not seen her since.

Dr. Dupuy said, he was called upon by the plaintiff, to the woman, she appeared very sick, and he supposed her incurable. He attended her from the 17th of May, 1818, till the 13th of June, when she died; on the second day of his attendance, she was in a state of complete *marasme*, with all the symptoms of a chronic disease in its last stage; her legs swollen. He attended her carefully, but, as he had supposed, to no purpose. The disease he believes

was of seven or eight months standing, and quite incurable when he saw her.

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Giguel, the plaintiff's brother-in-law, deposed, he knew the woman, who had before been his property. The defendant applied to him before he bought her, and he told him she was a good servant. He did not know her to be sick before she died at his house, on the 13th of June, the plaintiff having put her there.

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It is contended, that the plaintiff cannot recover, as the sickness of the slave was known to him at the time of the execution of the act of sale.

It is not easy to conclude, from the evidence in the case, that he knew the disease was an incurable one; and he had the plaintiff's assurance, that if it was a redhibitory one, it was warranted against; so that our sole inquiry is, was the disease a redhibitory one?

Ailments or infirmities constitute redhibitory defects, when they are incurable by their nature. So that the slave subject thereto is absolutely unfit for the services for which he is destined, or these services are so inconvenient, difficult and interrupted, that it is to

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be presumed, the buyer would not have bought her at all, if he had been acquainted with the defect; or that he would not have given so high a price, had he known that such a slave was subject to that sickness or infirmity. *Civ. Code*, 358, art. 80.

I understand this to mean, if the buyer knows the nature of the disease, *i. e.* that it is incurable. In the present case, the disease existed before the sale, and though curable in its origin, had now become incurable. This certainly was not known to the plaintiff; for who can believe, that if it was, he would have bought? He knew the slave to be sick, informed the vendor of it, and received for answer, that she was sold with a warranty of redhibitory diseases; among these, the law has classed incurable ones, such as that under which the slave laboured. It appears to me, the parties contemplated, that the vendee's claim would depend on the issue of the disease.

I think we ought to affirm the judgment of the parish court.

MATHEWS, J. I concur in this opinion for the reasons therein expressed.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

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vs.  
POME.

*Canonge* for the plaintiff, *De Armas* for the defendant.

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FERRERS vs. BOSEL.

APPEAL from the court of probates of the city of New-Orleans.

MARTIN, J. The only question in this case is, as to the admission in evidence of notarial instruments, executed at Bagur, in the kingdom of Spain.

The signature of Jose Puig y Pui, the notary before whom these instruments were executed, as well as his official capacity, are proven by the signatures and *signos* of three notaries of the district; by that of the constitutional alcade, at Bagur, and also by the American consul at Barcelona, who has also certified that of the alcade.

The authenticity given by Spanish officers, to these instruments, would give them credit in the tribunals of Spain; and I think, when the signature and seal of the American consul

A Spanish notarial instrument, attested by three notaries of the district, and the constitutional alcade, accompanied with a certificate under the hand and seal of the American consul, may be received in evidence on proof of the notarie's signature.

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are added to the proof of the hand writing of the notaries, they ought to be received in this.

I think therefore that the judgment of the court *a quo* ought to be affirmed with costs.

MATHEWS, J. I concur in the opinion.

It is therefore ordered and decreed, that the judgment of the court *a quo* be affirmed with costs.

*Moreau* for the plaintiff, *Livingston* for the defendant.

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LEWIS vs. PEYTAVIN.

A replication admits any new fact set forth in the answer, in avoidance of the claim, which it does not deny.

APPEAL from the court of the second district.

MARTIN, J. The plaintiff claims the price of a number of cattle by him sold to the defendant.

The latter pleaded the general issue, and that if he did buy the cattle, he gave, and the plaintiff received, in full payment and satisfaction of it, his promissory note, which he is ready to pay on presentation.

The plaintiff replied that the note given by the defendant is lost, so that he was forced to sue on a *quantum meruit*.

The district court gave judgment for the

plaintiff, being of opinion that it was better the defendant should run the chance of a future loss, than plaintiff should now sustain a present and real one. The defendant appealed.

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It seems to me the replication admits every new fact set up in avoidance of the claim in the answer, which it does not deny. The defendant having alleged that the note was given and received in satisfaction of the price of the cattle, and the note being admitted to have been given, this last circumstance, its having been given and received in satisfaction and payment, is admitted. If it is, the defendant is suable on the note only, and the contract of sale is fully executed, and can no longer support the vendor's claim for the price.

I think that the district court erred, and our judgment should be for the defendant.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that there be judgment for the defendant, with costs in both courts.

*Livermore* for plaintiff, *Workman* for defendant.

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*MITCHELL vs. ARMITAGE.*

*MITCHELL*

*vs.*

*ARMITAGE.*

APPEAL from the court of the parish and city  
of New-Orleans.

A master may  
correct his ap-  
prentice, but not  
in a wanton or  
cruel manner.

MARTIN, J. This is an action for the rescission of the indenture, by which the plaintiff's son was bound as an apprentice to the defendant, on account of cruel treatment; the defendant pleaded the general issue, and that he moderately chastised the plaintiff's son for his ill conduct, and particularly for having stabbed another apprentice of the defendant's:— There was judgment for the plaintiff, and the defendant appealed.

By consent, the judge's notes of the testimony came up with the record, in lieu of statement of facts, and the case has been submitted to us without an argument.

Dr. L'homoca deposed, that on the 23d of December, he was sent for to plaintiff's son, who had some fever for three days, in consequence, he believes, of a flogging. He had been severely whipped from the shoulders downwards, and the bruises were apparent; there were already some scabs on his wounds, but they must have bled much. The deponent said, that in his opinion, a master has no right

to beat so much (*martiriser*) his apprentice; the boy deserved to be more severely punished, but not by the master himself.

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Blache deposed, the plaintiff's son was brought to the mayor on the 23d, two days after he was whipt; he appeared to have been severely flogged; his shirt had blood on it; there were bluish marks of the whipping, which he thinks too severe for a master: the witness being asked whether he had seen these marks, answered yes, a little cut through, bluish, and a little bloody.

Carlos deposed, that the plaintiff's son quarrelled, at their common shop, where four apprentices were at work by a candle, with a black boy, a slave of their master, the defendant. The white boy wounded the black on his side, and was himself wounded. The plaintiff's son was taken into another room to be whipped; he came back bleeding through his shirt, and was sent to work again. They wished to whip him a second time, but the defendant's partner begged him off.

On his cross-examination, this witness said he has been with the defendant since May, 1817; is well treated, as well as the other apprentices. When any quarrel arises among

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the apprentices, the defendant must be informed of it, in order to settle it—they are rare. The plaintiff's son was reproached with not having referred his quarrel with the black boy, to the defendant, and answered he had not the patience; to which the defendant replied, he would have the patience to whip him; he begged pardon; the defendant gave him many lashes; the witness does not recollect how many. The black boy was not punished.

Simon declared, he is the defendant's neighbour, and saw the plaintiff's son with his shirt bloody, having been severely whipt. He has apprentices but would not whip them so. He has not seen white apprentices more or so much whipt by any master. He saw the plaintiff's son on the 22d, he might not be much cut, but bleeding.

Clifford deposed, he saw the plaintiff's son's shirt, with blood on it, and on the next day saw him in bed with a high fever.

Longbottom, defendant's partner, deposed—a quarrel arose between the plaintiff's son and a black boy of defendant's, who was wounded, by being stabbed in his side. He told the plaintiff's son to complain to defendant, he said he had not patience. He saw the plaintiff's son

whipt, and conceives the defendant might have chastised his own son in the same manner, for the same fault; he would have done so himself. He has seen, on other occasions, the defendant whip the black boy and others, on complaint. He has ordered them on such occasions to apply to him for redress.

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Odder deposed as the preceding witness, in regard to the struggle between the white and black boys. The latter was wounded with scissors, and did not complain; the plaintiff's son was wounded in his fingers. The quarrel arose about coming nearer to the light, and the whipping of the plaintiff's son ensued; the defendant gave him about twenty or thirtystrokes of a cow-skin; he would have whipped him a second time, but his partner begged his pardon; the defendant was in a great passion; the plaintiff's son was not compelled to return to his work; the deponent, tho' sleeping in the same room, did not hear him complain; he told him only not to come near him, in order likely not to hurt him; the black boy was not punished; the witness has lived five years with the defendant, and is well treated, whipped only when he deserves it, and no more; the scissors were long ones, with a side sharp;

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the plaintiff's son was whipt in the next room, and the deponent heard him say—enough, enough.

Homes deposed, that he had been three years with the defendant; he treats his apprentices as his own children, and not so severely as they occasionally deserve; he has had several apprentices, and the witness has never heard of a complaint among them.

Stawlons declared, that he has been five years with the defendant, and was only once corrected, more than he deserved, with a cow-skin:—on his cross-examination he said, that he was cruelly beaten; it was about two years ago; he was more beaten than the plaintiff's son, who was severely beat, and had many cuts; he had no parents.

Anderson declares that he has been twelve years with the defendant; his apprentices are well treated; the plaintiff's son was his confidential boy, and is treated with great kindness, and better than his own son; he has always corrected him with a cow-skin, and he has never heard of a complaint; the witness was himself an apprentice; and has been ten times corrected so; and sometimes more than the plaintiff's son; it has often appeared that

apprentices having been whipt and being gone home, were whipt by their parents and sent back.

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Another witness (not named in the judge's notes) declared, that he has been in the same situation, and a master cannot do without a cow-skin.

Dr. Deveze deposed, that on the 27th of December, at the request of the defendant, he visited the plaintiff's son, who had been very lightly flogged; he thinks hardly to hurt him through the epidermis. The correction appeared to him severe, as to local circumstances; that is to say, on a quarrel with a black boy, but without danger.

The judge adds to his notes of the evidence, that the plaintiff's son exhibited his back and shoulders to him, where he saw the marks of twenty lashes at least, of a black or bluish colour, attesting the defendant's severity. This was on the 9th of January last, eighteen days after the whipping.

These proceedings appear to me, grounded on a provision of our law, that if any master shall abuse, or cruelly, or evilly treat his indented servant or apprentice, or shall not discharge his duty towards him, in any of

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these cases, there will be sufficient cause to release the aggrieved party from his engagement, or to grant him such other redress as the equity or the nature of the case may require, in the discretion of the judge. *Civ. Code*, 38, art. 9.

That a master may lawfully correct his apprentice is expressly provided by law; that he must not do so in a wanton or cruel manner, is equally undeniable. So that, the only inquiry in the present case is, whether the whipping inflicted on the plaintiff's son, was so cruel, as to call for the forfeiture of the defendant's right to the boy's services, during the remaining years of his apprenticeship. Apprentices ought to be protected against the cruelty of their masters, but the latter purchase, during the first years of the apprenticeship, by the labour and trouble which they bestow on the instruction of the youth, and the expences of his maintenance, a right to his services, during the last years of the apprenticeship; a right of which they are not to be deprived, without a sufficient cause.

The witnesses for the plaintiff, present a strong case, which, if considered with the feelings that accompany the consideration of

a helpless white boy, severely whipt for a struggle with a slave, may easily magnify his sufferings, so as to excite indignation against the author of them. But if the evidence these witnesses give, be patiently considered, this indignation will considerably subside.

Dr. L'homoca, who saw the plaintiff's son two days after he was whipt, says the bruises were apparent; the wounds had scabs already, though they appeared to have bled much. His opinion is, that the boy deserved to be more severely punished, though he thinks the master ought not to have done it. Blache, who saw the boy on the same day, at the mayor's, thinks the whipping was too severe for a master. The boy's shirt had blood on it, and he describes the boy's back as a little cut through, having bluish marks, and being bloody. Simon, who saw him on the 22d, the next day after the whipping, says, he never saw an apprentice so severely whipt by his master; and describes his back as not much cut, but bleeding. Thus the testimony of the plaintiff's witnesses present the case of a boy severely whipt; his back cut and bleeding.

When we attend to the testimony of the defendant's witnesses, we find, that they think the whipping was not, in their opinion, too

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severe; that the boy was not thereby disabled a moment, to attend to his work. A gentleman of the faculty, who saw the boy six days after the whipping, thinks he was hardly whipt through the epidermis; another witness says, he would have whipt the boy as severely, if he had been his master.

If we divest the case of every thing which is matter of opinion, the result is, that the plaintiff's son was whipt with a cow-skin; received twenty or thirty lashes; that his back bled; exhibited small cuts, and bluish marks, for having wounded a black boy, with a sharp instrument, in a quarrel. I am ready to say, that the correction appears to me a severe one; such as ought not to be countenanced. But it appears to me, that the case is not of so black a die as to deserve an absolute forfeiture of the defendant's right to the boy's services, during the rest of his apprenticeship. I therefore think, that the judgment of the parish court ought to be reversed, and that the defendant ought to pay the costs of the appeal.

MATHEWS, J. I concur in the opinion delivered by judge Martin. The right of a master to correct his apprentice for negligence,

or misbehaviour, provided he does it with moderation, is expressly recognised by our *Civil Code*. The different degrees within which correction of this kind ought to be limited, by the term moderation, must be governed by the extent and nature of the offence committed by the apprentice. In the present case, it appears by the evidence, that the chastisement was inflicted, in consequence of the apprentice having wounded a slave of the appellant, whilst they were employed in the business of their master. Whether from the instrument used, or manner of giving the wound, it had a tendency to do a serious injury to the slave, does not appear. But the conduct of the plaintiff's son was certainly a gross violation of the order which ought to prevail in the shop of a mechanic, and which, it is probable, cannot be supported without strict discipline and a full portion of correction, properly applied. Although the punishment complained of in this suit, appears to have been somewhat severe; and although it is unpleasant, in consequence of the feeling which may be presumed to be excited between the parties, to place the apprentice again in the power of his master; yet I do

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not think, that the circumstances of the case, as disclosed by the evidence, are sufficient to authorise a court of justice to release the former from his apprenticeship; especially as it is a single act of correction, and nothing appears, which shews any deliberate cruelty on the part of the appellant towards his apprentices.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the cost of the appeal be borne by the defendant.

*Preston* for the plaintiff, *Hennen* for the defendant.

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CANFIELD vs. McLAUGHLIN.

A party who claims property attached, and has it delivered in bond, is not accountable for any money he became bound to pay to the defendant, and which he did pay.

APPEAL from the court of the first district.

MARTIN, J. This case was remanded to the district court, in February last, where it was decreed, that the plaintiff recover from the defendant \$358 7 cents. &c. and that "the claimants, having bonded the cotton shortly after the attachment, and sold it at the then market price (being a higher price than could

be had at this time) have a lien on the proceeds for the balance of account due them by the defendant, which, credited to the defendant, balances their general account. Judgment was, therefore, given to the claimants, for the proceeds of the cotton. The plaintiff appealed from so much of the judgment as relates to the claimants.

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The statement of facts refers us to the record of the case, as it stood before us in February last, and to the following deposition:

Mathews, a witness for the claimants, deposed, that they are the defendant's factors; that, at the time the cotton was attached and bonded, he was indebted to them, in the sum of \$4,500.

On his cross-examination, the witness declared, that the account of the defendant with the claimants, after crediting him with the proceeds of the cotton, is balanced; that since the attachment, the claimants have received from the defendant, 105 bales of cotton; ten of which the witness has delivered to Beatty & Greeves; and three to B. Levy & Co., for debts due them, and which they had commissioned them to receive from the defendant; that the net proceeds of the

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ninety-two bales remaining, amounted to \$1,400; that the witness went over to the defendant's plantation, to purchase from him the cotton last mentioned; and after it was weighed and delivered, and the price agreed on, *viz.* fifteen cents per pound, and before he left the plantation, he delivered to the defendant a draft on the claimants for \$1500, and over; that in balancing the account between the parties, the amount of this draft is credited to the defendant, as if paid in cash: it has never been presented; the claimants wrote to the defendant, after it was drawn, that it would be honoured; the claimants are indebted to the defendant for its amount, till it is paid. When the witness went to the defendant's, he took with him the account current between the defendant and claimants. After receiving it, he gave the former credit for the amount, and gave the aforesaid draft for the balance: this was in the latter part of March; the witness is sure it was after the 15th. The principal examination being resumed, the witness added, that the proceeds of the eighteen bales of cotton attached, amounted to \$878 6 cts.; and this sum was carried by the claimants to the credit of the defendant's account. The sale was made (without any authority from the court

or the defendant) for a fair, and the highest market price. The witness was sent by the claimants to purchase the defendant's cotton, and then he received the ninety-two bales. On his departure, the claimants told him any draft given by him on them, for the purchase of the cotton, would be honored.

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It is clear to me, that the claimants having a lien on the cotton attached, they are only accountable on their bond for the balance that may remain in their hands, after the payment of the balance due them. The evidence shews, that at the time of the attachment, and of the delivery of the cotton to them, on their bond, that balance was considerably above the value of the cotton. Had this been known at the time of the attachment, the cotton ought not to have been taken from them. Since they had a lien on it, they well might, on its return into their hands, sell it to pay themselves; this they have done, and it is not contended, that it was unfairly done. The condition of their bond was, that they should abide the order of the court, i. e. deliver the cotton or its value, if it appeared to the court that they had no legal claim thereto.

It appears, that seeing the cotton attached was not sufficient to cover their claim, they

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deemed it advisable to purchase other cotton, which the defendant had, to a greater amount than that of their claim; and in so doing, it became necessary to provide for the payment of the balance to the defendant. I see no impropriety in this; they were not garnishees, bound to hold any property of the defendant, in their hands; they were claimants of property of his, on which they had a lien; this property they obtained on giving bond to support their claim; they have done so, and nothing can be claimed of them.

I do not know that they were bound to retain, or even could have justified themselves in retaining, any property of the defendant, which came to their hands, after they received the cotton from the sheriff.

Nothing prevented the claimants from purchasing other cotton from the defendant, and paying him cash therefor. Their agent, instead of paying cash, gave a draft on the claimants, which they had previously bound themselves to accept, and which, when they were informed of its having been given, they promised to honor. It is not probable that any cotton could have been obtained by the claimants, beyond the amount of their claims, without paying cash, or giving the equivalent.

The whole transaction appears to me perfectly fair.

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I think the judgment of the district court should be affirmed with costs.

MATHEWS, J. I concur in this opinion. The claimants had a privilege and preference on the cotton attached, at the time of levying of the attachment, to an amount exceeding its value, and it does not appear to me, that any thing has occurred to destroy their lien.

Hoffman for the plaintiff, Maybin for the defendant, Eustis for the claimants.

SEGHERS vs. HANNA'S CREDITORS.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. The plaintiff, having entered into a written agreement with the syndics of the insolvent, by which they stipulated to pay him \$500 for his professional services in the affairs of the estate, obtained a rule against them, to shew cause why they should not pay him that sum, as a privileged debt, according to said agreement, it being first approved by the court; the syndics testified their willingness

If the syndics' attorney stipulate for a fixed sum, in writing, he must sue on the contract, and cannot have judgment on a rule.

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to submit to the rule, provided the payment was made \$300 now, and the rest on the conclusion of the affairs.

H. R. Denis, the counsel appointed to defend the interests of the absent creditors, opposed the rule, and the court having discharged it, the plaintiff appealed.

It appears to me that the special contract made with the syndics cannot be enforced on a rule to shew cause; the party did not rely on payment on a *quantum meruit* as is ordinarily done, in cases of insolvency, but chose to enter into a special contract; he must therefore seek his remedy there, and the judgment of the parish court ought to be affirmed with costs.

MATHEWS, J. concurred. See *July Term*.

The plaintiff, *in propria personâ*, Denis for the defendants.

SEGHERS vs. HIS CREDITORS.

APPEAL from the court of the first district.

Creditors, who prove their debts, at a meeting, need not renew the proof, at a subsequent one.

A notary can-

MARTIN, J. The insolvent's creditors having met before a notary to appoint a syndic, and the proceedings of their meeting being brought

to court for homologation, J. H. Holland, one of them, opposed their homologation, on the ground, that Cucullu, the creditor who appears as having been appointed syndic, was not the person legally chosen, but that he, Holland, the opposing creditor, was. The proceedings were homologated, and Holland appealed.

The opposition was grounded, on the admission at the meeting of the following persons, as creditors of the insolvent, viz. Rion, Gurly and Guillot, the Ursuline nuns, Labatut, Mercier, Labarthe, Morgan and Sainet.

1. Because, none of the said persons, Sainet excepted, have sworn, in the manner required by law, to the truth and legality of their respective debts; the oaths having been taken by proxy.

2. Because, the persons appearing for them (principally Rion) produced none, or an inadmissible power.

3. Because, Sainet and Mercier had ceased to be creditors, the former having been paid in full, and the amount of the latter's claim having, long before, been at her disposal, and she having delayed to receive it, in order to interfere in the affairs of the creditors.

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not certify any thing that happened at a meeting of creditors, otherwise than by a copy of his minutes—if nothing appears there, he must swear.

A creditor who was present at a meeting, and did not object to any vote, cannot oppose the homologation of the proceedings, on the allegation that proper powers were not produced.

A judgment of homologation must, according to the constitution, contain the reasons on which it is grounded.

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4. Because, Labarthe and Morgan, respectively claim the same sum, a suit depending, which is to ascertain to whom it is due.

Eighteen persons claiming \$41,301 appeared at the meeting; ten of whom, claiming \$21,641, voted for Cucullu, as syndic; and eight claiming \$19,660, voted for Holland. The claims of the persons whose votes, it is contended, ought not to have been received, amount to \$16,516.

The counsel for the appellant contends, that the judgment appealed from ought to be reversed, because it contains none of the reasons on which it was grounded.

I think this objection must prevail; the constitution requires judges to give their reasons in final judgments. The present was such a one.

But as the whole evidence is before us, we are enabled to proceed and give the judgment which the district court ought, in our opinion, to have given.

The second ground of opposition is the only one, which, in my opinion, presents the least difficulty.

It appears to me useless to express any opinion as to the manner in which the parties

swore to their debts at the meeting under consideration. I have confined my enquiry, in this respect, to the parties objected to in the district court, and find that all of them, except Guillot and Gurly, proved their debts without any objection as to the mode, at the first meeting of the insolvent's creditors, the proceedings of which have been homologated. This, in my opinion, suffices; and it appears to me unnecessary, at any other period, that they should prove them. The debt of Gurly and Guillot, is only \$190; and if they were excluded, there would still remain a majority of creditors, in persons and amount, in favour of Cucullu.

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Sainet appears, by the record, to have received the amount of his claim, under restrictions; what these restrictions are, do not appear; and since he swore that it was still due, duty and inclination lead me to the belief, that he received it, in such a manner, that the amount is not absolutely his, and consequently his claim is not yet extinguished. This is the more probable, that he was, and still is, a syndic; and he may still be considered as accountable for the money as such. I see no evidence to support the allegation,

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that the account of madame Mercier's claim, ever was at her disposal.

Labarthe voted for Cucullu, and Morgan for Holland; and if, as is contended, these persons are creditors of one and the same claim, and a suit be depending to determine which of them is the legal claimant, both, if either of the votes are to be rejected; and if so, the result of the election is the same, as if they are retained.

So that, the only ground of objection to be considered, is the second, viz. the absence or illegality of the powers of those who appeared to vote for others.

In this respect, the votes of the nuns, Rion, Labatut, and Mercier, only are exceptionable.

The holy ladies' vote was given by F. Lambert, who had a power to represent them in Seghers' affairs, subscribed R. K. André, for the mother St. Michel Gensoul; and the appellant's counsel has informed us, that the same attorney appeared without any power at all, at the first meeting, and took the oath.

Rion was represented under a power, executed by his wife.

Labatut and Mercier were so, by persons styling themselves their attornies, but who do not appear to have produced any power.

The notary has given a certificate (which comes up with the record) stating, that the powers of attorney, shewn here, are annexed to the proceedings; that none other were shewn there. I have disregarded this certificate, believing, that a notary can only legally certify copies of proceedings in his office, and that any other fact, in his knowlege, must be disclosed on oath.

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The opponent or appellant does not allege, that the persons who represented the nuns, Labatut, Rion, or Mercier, were not duly authorised, but only, that they did not produce any power at all, or such as were not admissible. He was present at the meeting; neither he, the notary, nor any of the other creditors opposed the votes now complained of, on the ground of a want of authority in the persons who offered them, and these persons were without any difficulty permitted to vote.

I therefore think, that we cannot now listen to the opponent and appellant, who had the opportunity to make their objections at the meeting, before the votes were received, when the parties might probably have, with facility, supplied any deficiency in the evidence, which they produced, of their authority to

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represent their principals. I conclude, that we ought to homologate the proceedings; but as there was not any reason in the judgment, the appeal was properly taken, and the appellee ought to pay the costs of it.

MATHEWS, J. I concur in the opinion for the reasons expressed therein.

It is therefore ordered, adjudged and decreed, that the proceedings had before the notary, be homologated, but as there was not any reason in the judgment of the district court, the appeal was properly taken; and it is further ordered, that the appellees pay the costs of it.

*Seghers* for the opposing creditor, ———  
for the defendants.